Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–163–09 OF 2014
ASMABI MOHAMAD J
16 JUNE 2016

Civil Procedure — Judicial review — Application for — Applicant refused to commence collective bargaining — Trade dispute referred to Industrial Court — Industrial Court found in favour of respondent — Applicant applied under O 53 of the Rules of Court 2012 for judicial review of Industrial Court's award — Whether applicant could utilise service charge to meets its obligation to pay minimum wage — Whether employees outside scope of respondent's representation could share service charge — Whether award could be severed — Whether 20 step salary scale justified — Whether award which ordered that effective date of first collective agreement could be backdated reasonable — Whether decision making process suffered from infirmities — Industrial Relations Act 1967 ss 9(1) & 30(7) — Rules of Court 2012 O 53

The respondent, the union of employees of Crystal Crown Hotel & Resort Sdn Bhd ('the applicant') had invited the applicant to commence collective bargaining over the terms and conditions to be incorporated in the first collective agreement ('the first CA'). Nevertheless, the applicant refused to commence collective bargaining; hence the dispute was referred to the Industrial Court ('the IC'). In giving the award, the IC adopted the respondent's proposals and ordered that: (a) the effective date for the first CA was 1 October 2011; (b) a 10% salary adjustment from 1 October 2011; (c) fixed annual increments from RM40–RM60 up to 30 September 2013; (d) fixed annual increments from RM60–RM100 from 1 October 2013; (e) minimum salaries ranging from RM900–RM1300 for the respective job categories as documented in Appendix B to the award; (f) a 20 step salary structure be implemented; and (g) the service charge system be retained and limited to only employees covered under the scope of the first CA. Aggrieved by the award, the applicant filed the present action ('encl 5') for judicial review pursuant to O 53 of the Rules of Court 2012 seeking, inter alia, a certiorari to quash the said award and a mandamus to direct that the matter be remitted to the IC to be heard before another panel. The issues for court's consideration were: (a) whether the applicant could implement a clean wage system and abolish the service charge system; (b) whether the applicant could restructure the wages by utilising the service charge or a portion thereof to top up its

employees' basic wage to meet up the payment of minimum wages; (c) whether service charge could be distributed to employees who were not within the scope of the respondent's representation; (d) whether, in view of the respondent's concession on retrospective adjustment of salaries, the award could be severed; (e) whether the award which accepted the respondent's proposal on salary structure and the 20 step increment was reasonable; (f) whether the award which ordered that the effective date of the first CA could be backdated to 1 October 2011 was reasonable; and (g) whether decision making process suffered from infirmities.

Held, refusing the prayers sought in terms of encl 5 with costs of RM7,000:

(1) The rationale and concept for the introduction of the service charge in the hotel industry showed that the money collected and deposited into the joint account of the employee and the hotel belongs to the eligible employees of the hotel and the payment to the employees in accordance of the service points allocation is provided in the contract of employment. Thus, the court agreed with the award made by the IC that the applicant could not be permitted to meet its obligation to pay the minimum wage by utilising the service charge paid by its customers or patrons. In view of the above, the 'clean wage' system proposed by the applicant was rightly rejected by the IC (see para 43).

(2) Since it had been ruled by the Court of Appeal in *Hotel Equitorial (M) Sdn Bhd v Thomas George MJ George* (Civil Appeal No R2–16–6 of 1995) that service charge is part of wages, therefore it did not behove that the IC decide that a portion of that wages should be given to the employer for the same to be utilised to pay the employees. The IC was justified in rejecting the applicant's proposal for the service charge to be utilised to make up for the minimum wage provided under the law. The same applied to the proposal of the applicant for a portion of the service charge to be utilised to supplement the basic wage to meet the RM900 (see paras 47 & 49).

(3) The IC had correctly rejected the applicant's proposal for employees outside the scope of the respondent's representation and not covered by the CA to be allowed to share the service charge. If the IC were to accede to the same, this would offend s 9(1) of the Industrial Relations Act 1967 ('the Act') as the security officers and secretaries were excluded under the said section (see paras 50–51).

(4) The court is vested with the authority to sever part of the award from the rest of the award leaving the rest of the award valid and binding. In the present case, components (b) and (c) of the award could be easily removed from the award and it was not 'inextricably interconnected' with other components (see paras 54–55).

(5) The 20 step salary scale was justified and ought to have been accepted on the basis that: (a) the applicant had been in operation for almost 20 years; (b) the respondent was guided by the 20 step salary scale adopted by a neighboring hotel, Shah Village; and (c) despite the first CA being the first CA to be executed, the applicant had been in business for almost 20 years (see paras 57–58).

(6) The award touching the effective date of the first CA was well within the provision of s 30(7) of the Act. Thus, this part of the award ought not to be disturbed (see para 59).

(7) In resolving the dispute, the IC had discussed the correct principles of law enunciated in the cases highlighted before the court. The court was satisfied that the IC had asked itself the correct questions in making its finding as reflected in the award and had considered relevant matter. On the totality of the evidence, the IC had acted within its jurisdiction and duties. There was sufficient evidence to assist the IC in handing down the award and there was no error committed by the IC. Thus, the decision of the IC could neither be termed as irrational nor unreasonable for the same to be quashed by the court (see paras 61–62 & 65–66).

[Bahasa Malaysia summary

Responden, kesatuan pekerja Crystal Crown Hotel & Resort Sdn Bhd ('pemohon') telah menawarkan pemohon untuk memulakan rundingan kolektif bagi terma dan syarat yang akan dimasukkan dalam perjanjian kolektif pertama ('CA pertama'). Walau bagaimanapun, pemohon enggan memulakan rundingan secara kolektif; maka pertikaian tersebut dirujuk ke Mahkamah Perusahaan ('MP'). Dalam mengeluarkan award, MP mengguna pakai cadangan responden dan memerintahkan (a) tarikh kuat kuasa CA pertama adalah 1 Oktober 2011; (b) pelarasan gaji 10% bermula dari 1 Oktober 2011; (c) kenaikan tahunan daripada RM40–RM60 hingga 30 September 2013; (d) kenaikan tetap tahunan daripada RM60–RM100 mulai 1 Oktober 2013; (e) gaji minima antara RM900–RM1300 untuk setiap kategori masing-masing seperti yang didokumenkan dalam Lampiran B untuk award tersebut; (f) satu struktur gaji 20 langkah dilaksanakan; dan (g) sistem caj perkhidmatan dikekalkan dan terhad pada pekerja yang dilindungi di bawah skop CA. Terkilan dengan award tersebut, pemohon memfailkan tindakan ini ('lampiran 5') bagi semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah 2012 memohon, antara lain, perintah certiorari membatalkan award tersebut dan mandamus agar perkara tersebut dikembalikan kepada MP untuk didengar di hadapan panel lain. Isu-isu bagi pertimbangan mahkamah adalah: (a) sama ada pemohon boleh melaksanakan sistem gaji bersih dan menghapuskan sistem caj perkhidmatan; (b) sama ada pemohon boleh menyusun semula gaji dengan menggunakan caj perkhidmatan atau sebahagian daripadanya untuk menambah gaji asas para pekerja untuk memenuhi bayaran gaji minimum; (c) sama ada caj perkhidmatan boleh

diedarkan kepada pekerja yang tidak terletak bawah skop perwakilan responden; (d) sama ada, berdasarkan konsesi responden pada pelarasan retrospektif gaji, award boleh terputus; (e) sama ada award yang menerima cadangan responden pada struktur gaji dan kenaikan 20 langkah adalah berpatutan; (f) sama ada award tersebut yang memerintahkan bahawa tarikh kuat kuasa CA pertama boleh dikebelakangkan hingga 1 Oktober 2011 munasabah; dan (g) sama ada proses membuat keputusan mempunyai kelemahan.

Diputuskan, menolak permohonan lampiran 5 dengan kos sebanyak RM7,000:

(1) Rasional dan konsep bagi pengenalan caj perkhidmatan dalam industri perhotelan menunjukkan wang dikutip dan didepositkan dalam akaun bersama pekerja dan hotel milik kakitangan hotel yang layak dan bayaran kepada pekerja berdasarkan mata perkhidmatan tersedia yang diperuntukkan dalam kontrak pekerjaan. Oleh itu, mahkamah bersetuju dengan award MP bahawa pemohon tidak boleh dibenarkan memenuhi kewajipan membayar gaji minimum dengan menggunakan caj perkhidmatan yang dibayar oleh pelanggan atau pelanggan Saham. Berdasarkan ini, sistem 'gaji bersih' yang dicadangkan oleh pemohon sewajarnya ditolak oleh MP (lihat perenggan 43).

(2) Oleh kerana Mahkamah Rayuan telah memutuskan dalam *Hotel Equatorial (M) Sdn Bhd v Thomas George MJ George* (Rayuan Sivil No R2–16–6 Tahun 1995) bahawa caj perkhidmatan adalah sebahagian daripada gaji, oleh itu tidak sepatutnya MP memutuskan bahawa satu bahagian daripada gaji perlu diberi kepada majikan agar dapat digunakan untuk membayar pekerja. MP bertindak wajar dalam menolak cadangan pemohon agar caj perkhidmatan digunakan untuk memenuhi gaji minimum yang diperuntukkan di bawah undang-undang. Ini terpakai pada cadangan pemohon agar sebahagian daripada caj perkhidmatan digunakan untuk menyumbang pada gaji asas untuk memenuhi RM900 tersebut (lihat perenggan 47 & 49).

(3) MP telah dengan betul menolak cadangan pemohon bagi pekerja luar skop pewakilan responden dan tidak dilindungi oleh CA dibenarkan berkongsi caj perkhidmatan. Jika MP memenuhinya, ini akan melanggar s 9(1) Akta Perhubungan Perusahaan 1967 ('Akta') kerana pegawai keselamatan dan setiausaha terkecuali di bawah seksyen tersebut (lihat perenggan 50–51).

(4) Mahkamah mempunyai kuasa memutuskan bahagian award daripada award sepenuhnya, menjadikan award sepenuhnya sah dan mengikat. Dalam kes ini, komponen (b) dan (c) award boleh dikeluarkan dengan mudah daripada award dan ini tidak saling berkait dengan komponen lain (lihat perenggan 54–55).

(5) Tangga gaji 20 langkah wajar dan sepatutnya diterima atas dasar: (a) pemohon telah beroperasi selama hampir 20 tahun; (b) responden dipandu oleh tangga gaji 20 langkah yang diterima pakai oleh hotel bersebelahan iaitu Shah Village; dan (c) walaupun CA pertama adalah CA yang pertama yang dilaksanakan, pemohon telah menjalankan perniagaan selama hampir 20 tahun (lihat perenggan 57–58).

(6) Award yang menyentuh tarikh kuat kuasa CA pertama terjumlah dalam peruntukan s 30(7) Akta. Oleh itu, bahagian award ini tidak sepatutnya diganggu (lihat perenggan 59).

(7) Dalam menyelesaikan pertikaian tersebut, MP telah membincangkan prinsip undang-undang yang betul undang-undang yang dinyatakan dengan jelas dalam kes-kes yang diutarakan di mahkamah. Mahkamah berpuas hati bahawa MP telah menanyakan soalan yang betul dalam membuat keputusannya seperti yang ditunjukkan dalam award tersebut dan telah mengambil kira perkara berkaitan. Berdasarkan keseluruhan keterangan, MP telah bertindak berdasarkan bidang kuasanya dan tanggungjawabnya. Terdapat bukti yang mencukupi untuk membantu MP menjatuhkan award dan tiada kekhilafan oleh MP. Oleh itu, keputusan MP boleh dikatakan tidak rasional dan tidak munasabah untuk dibatalkan oleh mahkamah (lihat perenggan 61–62 & 65–66).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

Cases referred to

Beli ak Empoi & Ors v Sarku Engineering Services Sdn Bhd [2015] 4 MLJ 406; [2011] 2 LNS 93, CA (refd)

Bukit Jambul Hotel Development Sdn Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia [2005] 2 ILR 927, IC (refd)

Carlow Kilkenny Radio Ltd, Kildare Radio Ltd and Carlow Kildare Radio Ltd v Broadcasting Commission of Ireland [2003] 3 IR 528, SC (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)

Decor Wood Industries (Trengganu) Sdn Bhd v Timber Employees' Union [1990] 1 ILR 423, IC (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor [2009] 6 MLJ 402, CA (refd)

Hotel Continental (Penang) Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers Award No 217 of 82 (unreported) (refd)

Hotel Continental (Penang) Sdn Bhd v National Union of Hotel, Bar and

Restaurant Workers [1984] ILR 34, IC (refd)
Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers Award No 88 of 82 (refd)
Hotel Equitorial (M) Sdn Bhd v Thomas George MJ George Civil Appeal No R2–16–6 of 1995 (unreported) (not folld)
Hotel Perdana Sdn Bhd, Kota Bharu, Kelantan v National Union of Hotel, Bar & Restaurant Workers [1984] ILR 748 752, IC (refd)
Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia v Hotel Equitorial (M) Sdn Bhd [2008] 3 ILR 590, IC (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2015] 6 MLJ 77; [2015] 9 CLJ 179, CA (folld)
Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493; [2006] 2 CLJ 501, CA (refd)
Mersing Omnibus Co Sdn Bhd v Kesatuan Pekerja-pekerja Pengangkutan Semenanjung Malaysia & Anor [1999] 1 MLJ 44; [1998] 2 CLJ Supp 53, HC (refd)
National Union of Hotel, Bar & Restaurant Workers v HM Shah Enterprise Sdn Bhd [1981] 1 ILR 192, IC (refd)
National Union of Hotel, Bar and Restaurant Workers, Peninsular Malaysia v Masyhur Mutiara Sdn Bhd [2014] 1 MELR 286 (refd)
Palmco Holdings Bhd v Commissioner of Labour & Anor [1986] 1 MLJ 492, SC (refd)
Peter Anthony Pereira and Another v Hotel Jayapuri Bhd and Another [1986] 1 WLR 449, PC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
V Subramaniam & Ors v Craigielea Estate [1982] 1 MLJ 317, FC (refd)
William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1; [1997] 3 CLJ 235, CA (refd)

Legislation referred to

Employment Act 1955 ss 2, 2(a), (b), (c), (d), (e), (f), 23
Industrial Relations Act 1967 ss 9(1), 26, 26(2), 30(7), 34
Minimum Wages Order 2012
National Wages Consultative Council Act 2012 ss 2, 21, 22, 23
Rules of Court 2012 O 53, O 53 r 3(2)
Sabah Labour Ordinance s 2
Sarawak Labour Ordinance s 2
Trade Unions Act 1959

N Sivabalah (Reena Embasegaran with him) (Shearn Delamore & Co) for the applicant.
S Ambiga (Shireen Selvaratnam with her) (Sreenevasan) for the respondent.

Asmabi Mohamad J:

INTRODUCTION

[1] This was an application by the applicant, Crystal Crown Hotel & Resort Sdn Bhd ('the applicant') for judicial review under O 53 of the Rules of Court 2012 ('the ROC 2012') for following orders:

(a) an order for certiorari to quash the Award No 875 of 2014 handed down on 18 July 2014;

(b) an order of mandamus for the matter to be remitted to the industrial court to be heard before a different panel;

(c) any other relief that this honourable court deems fit and appropriate; and

(d) costs.

CAUSE PAPERS

[2] For the purpose of this judicial review application, the following documents were filed and referred to by this court:

(a) the application for leave for judicial review dated 12 September 2014 ('encl 1');

(b) statement pursuant to O 53 r 3(2) of the Rules of Court 2012 ('encl 2');

(c) affidavit in support affirmed by Khoo Hui Keam on 10 September 2014 ('encl 3');

(d) notice of hearing for judicial review dated 5 December 2014 ('encl 5');

(e) the respondent's affidavit in reply No 1 affirmed by Rusli bin Affandi on 22 January 2015 ('encl 9');

(f) the applicant's affidavit in reply affirmed by Khoo Hui Keam on 9 February 2015 ('encl 10'); and

(g) the respondent's affidavit in reply No 2 affirmed by Rusli bin Affandi on 24 February 2015 ('encl 11').

[3] For ease of reference, the applicant and the respondent would be referred to as the 'hotel' and the 'union' respectively.

BACKGROUND FACTS

[4] The facts leading to the filing of the judicial review application had been set out by both learned counsel for the applicant and the respondent. I could not do any better than to adopt the facts as narrated by learned counsel with some modifications as follows:

(a) the hotel commenced its business in January 1995;

(b) the union was registered under the Trade Unions Act 1959 and was granted recognition on 12 March 1999. The membership of the union is open to all categories of employees employed by the hotel, save for those employed in the managerial, executive, confidential, security and probationary categories;

(c) around October 2011, the union had invited the hotel to commence collective bargaining over the terms and conditions to be incorporated in the first collective agreement ('the first CA');

(d) the hotel refused to commence collective bargaining with the union;

(e) pursuant to a letter dated 16 November 2011, the union wrote to the Director General of Industrial Relations ('DGIR') informing the DGIR that a trade dispute existed between the union and the hotel over the refusal of the hotel to commence the collective bargaining. In the same letter, the union had requested a meeting be convened to resolve the dispute failing which the matter would be referred to the Industrial Court ('IC') for a decision;

(f) on 9 February 2012, the DGIR initiated a meeting in order to try to resolve the dispute but was not successful;

(g) on 16 February 2012, the Minister for Human Resources referred the dispute to the IC under s 26(2) of the Industrial Relations Act 1967 ('the IRA');

(h) with the assistance of the IC, both parties to the dispute managed to agree on the terms and conditions to be incorporated in the first CA except for the effective date and duration of the first CA (article 2), salary structure, annual increment and Appendices A and B (article 10) and service charge, Appendices A and B (article 12);

(i) on 18 July 2014, the IC handed the Award wherein the IC had adopted the Union's proposals and ordered as follows:

(i) the effective date for the first CA was 1 October 2011;

(ii) a 10% salary adjustment from 1 October 2011;

(iii) fixed annual increments from RM40–RM60 up to 30 September 2013;

(iv) fixed annual increments from RM60–RM100 from 1 October 2013;

(v) minimum salaries ranging from RM900–RM1,300 for the respective job categories as documented in Appendix B to the award;

(vi) a 20 step salary structure be implemented; and

(vii) the service charge system be retained and limited to only employees covered under the scope of the first CA.

[5] Aggrieved by the award of the IC No 875 of 2014, the applicant moved this court by way of encl 5 seeking, amongst others, a certiorari to quash the said award and a mandamus to direct that this matter be remitted to the IC to be heard before another panel.

THE LAW

[6] In hearing this judicial review application, I reminded myself that this is not an appeal against the decision, action and omission of the first respondent but a judicial review of its decision, action and omission. The governing principle in judicial review is that the review is restricted to the decision-making process, and not the merits, substance or justification of the decision in question. Therefore, it is not the function of this court at this stage to look at the correctness of the decision, action or omission but rather with the way the decision, action and omission were arrived at.

[7] I am also mindful of the trite position that I should not venture into disturbing findings of fact made by the first respondent in view of the fact that a judicial review is not an appeal from a decision but rather a review of the decision making process. However, I am also guided by the principles of the Court of Appeal in the case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2015] 6 MLJ 77; [2015] 9 CLJ 179 where His Lordship Abu Samah Nordin JCA (as His Lordship than was) in delivering the judgment of the court, held as follows:

> [21] There is a clear distinction between judicial review and appeal. Appeal is concerned with the merits of the case, in the sense that the appellate court can substitute its own opinion for that of the decision maker. Appeals lie on fact and law. Such rights of appeal are statutory and the courts possess no inherent appellate jurisdiction. Review, by contrast, is not concerned with the merits of the decision but with the validity of the decision-making process: ... The Federal Court in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 had clarified that the decision in *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 that *the court could substitute its own view to that of the Industrial Court should only be exercised in the most appropriate of cases*. The same view was expressed

in a subsequent decision of the Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1.

[8] The above Court of Appeal case reiterated the principles laid down by the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 that the High Court is empowered to scrutinise the award for not only of process but for substance to correct the flawed conclusions.

[9] There is also plethora of cases on point, which had delved on the functions of the court in exercising its judicial review powers. Suffice for me to quote the very often quoted decision of Lord Roskill in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] 1 AC 374 at p 414 as follows:

> ... This appeal is concerned with and only with judicial review. Judicial review, as my noble and learned friend Lord Brightman stated in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at p 1174, 'is not an appeal from a decision, but a review of the manner in which the decision was made'.

(See *Carlow Kilkenny Radio Ltd, Kildare Radio Ltd and Carlow Kildare Radio Ltd v Broadcasting Commission of Ireland* [2003] 3 IR 528; *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; *Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor* [2009] 6 MLJ 402).

[10] I have also reminded myself that it is settled law to qualify as a subject for judicial review, the decision, action and/or omission must have the effect of altering the rights or obligations of the applicant and deprive the applicant of some benefit or advantage (see *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] 1 AC 374).

[11] Mindful of my role as a judge exercising my judicial review powers, I will focus on the manner the decision, action and/or omission was allegedly made or omitted to do by the first respondent and examine if the decision, action and/or omission was tainted with what Lord Diplock described in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] 1 AC 374 as 'illegality', 'irrationality' and 'procedural impropriety'.

[12] I have examined the statement of the applicant made pursuant to O 53 r 3(2) of the Rules of Court 2012 and found that the applicant had relied amongst others, on irrationality and illegality as the grounds to mount attack on the decision of the respondent herein.

ISSUES TO BE DETERMINED BY THE COURT

[13] The issues raised for this court's determination extracted from the respondent's written submission were as follows:

(a) whether the hotel can implement a clean wage system and abolish the service charge system ('clean wage') (Issue 1)?

(b) in the alternative, in the event the service charge system is maintained, whether the hotel can restructure the wages by utilising the service charge or a portion thereof to top up its employees' basic wage to meet the payment of minimum wage ('hotel utilising service charge funds') (Issue 2)?

(c) whether in the event the service charge system is maintained, service charge can be distributed to employees who are not within the scope of the union's representation (distribution of service charge) (Issue 3)?

(d) whether, in view of the unions concession on retrospective adjustment of salaries, the award can be severed ('retrospective adjustments') (Issue 4)?

(e) whether the award which accepted the union's proposal on salary structure and the 20 step increment is reasonable ('salary structure') (Issue 5)? and

(f) whether the award which ordered that the effective date of the first collective agreement can be backdated to 1 October 2011, is reasonable ('effective date of award') (Issue 6)?

DISCUSSIONS OF THE ISSUES AND FINDINGS OF THE COURT

[14] The applicant contended that the decision of the IC which ordered the increase of the minimum salaries of the employees across the board while maintaining the service charge system and further ordering retrospective adjustments to be made had resulted in unfair enrichment to certain categories of the employees of the applicant. According to the applicant, this decision is tainted with illegality and irrationality, the particulars of which had been set out in the applicant's O 53 statement.

National minimum wage — concept and rationale

[15] Before I delve into the issues, it would be appropriate at this juncture for me to give a brief introduction of the concept and rationale for imposing a National Minimum Wage (details could be seen in the extracts from the Penyata Rasmi Parlimen Dewan Rakyat (*Hansard*) on the second and third

reading of the National Wages Consultative Council Bill (see pp 81A–81H of B1)).

[16] The National Wages Consultative Council Act 2012 ('the NWCC') was introduced to prevent exploitation of labour through payment of unduly low wages. The NWCC recognises that wages cannot be left to be determined by market forces and imposes an obligation on an employer to pay a minimum wage, irrespective of the employer's capacity to pay. The minimum wage system had been introduced in Malaysia by way of the Minimum Wages Order 2012 ('the MWO'), made pursuant to the NWCC.

[17] The process for the determination of the minimum wages system had been provided under ss 21 and 22 of the NWCC. After the minimum wages rates had been recommended by the National Wages Consultative Council ('Council') to the government and the same had been agreed by the government, these minimum wages system would be *gazetted* pursuant to s 23 of the NWCC.

[18] What then is the minimum wage? The International Labour Organisation had defined minimum wage as the lowest wage that should be paid to the employees for work or services done. This is to ensure that the bare minimum needs of these employees and their families are met based on the socio-economic conditions of the country. The minimum wage would be set at a level that is reasonable both for the employees and the employers so that it would not be too high as to burden the employer or too low as to exploit the employees. Its purpose is not only to provide for bare subsistence of life but also to take into consideration some measure of education, medical requirements and amenities to enable the worker to preserve his efficiency as a workman (see OP Malhotra's *The Law of Industrial Dispute* (6th Ed) at p 594–597).

Points raised by the applicant

[19] The applicant contended that the IC had committed a fundamental error as it had misconstrued its power in resolving the trade dispute when it decided that the fundamental terms and conditions of the salary with the service charge points per month offered in the offer of employment could not be unilaterally altered and that the hotel was bound by the fundamental terms of the contract.

[20] The applicant further contended that the IC had failed to take into account the provision of s 26 of the IRA which empowered the IC to order the implementation of the clean wage system and that the position taken by the IC that it could not formulate the terms and conditions of the parties had rendered

A the entire decision of the IC a nullity and therefore liable to be quashed by this court.

[21] It was also the contention of the applicant that the IC had abdicated its statutory role under s 34 of the IRA, as it had failed to consider elements of B public interest, financial implication and effect of the award on the economy of the country and on the industry, in making the award (see *Mersing Omnibus Co Sdn Bhd v Kesatuan Pekerja-pekerja Pengangkutan Semenanjung Malaysia & Anor* [1999] 1 MLJ 44; [1998] 2 CLJ Supp 53).

C

[22] In exercising its role under the IRA, the applicant argued that the IC was empowered to relook at the contractual terms of the parties and reformulate the same. In making the ruling that the service charge was a contractual entitlement which should not be disturbed, the IC was being inconsistent, D arbitrary and guilty of discriminatory practice as various contractual terms were varied to the applicant's detriment.

[23] Accordingly, the applicant emphasised that the findings of the IC were perverse due to the following factors:

E

(a) as the first CA was the first collective agreement the service charge was never provided for in prior collective agreement;

(b) the IC had acted on the misguided belief that the service charge belongs to the employees;

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(c) the offer of employment letter dated 29 October 2008 concerning COW1 had expressly provided that the remuneration package was 'subject to review' and had in fact been revised before; and

(d) although the letter of offer of employment made reference to 2.5 service G charge points, the value of the same had not been stipulated. This value to be allocated to each point is subject to the hotel's discretion. In computing compensation, the IC had not factored in variable components by converting the same into contractual rights (see *Beli ak Empoi & Ors v Sarku Engineering Services Sdn Bhd* [2015] 4 MLJ 406; H [2011] 2 LNS 93).

[24] The applicant contended that under the NWCC, each worker is only entitled to RM900 as stated in the MWO and nothing more. Alternatively, the applicant contended that should the service charge system be maintained, this I sum should be utilised to increase the salary to RM900. It was also the contention of the applicant that the IC had failed to consider the reason the service charge was introduced was to supplement the low salaries of the applicant's employees and with the advent of the MWO the need to supplement the basic wages no longer existed.

[25] Besides the above, it was also the contention of the applicant that the service charge was introduced as part of the remuneration package as a result of the fluctuating business and inconsistent occupancy rates which would cause the hotel to being incapable of maintaining a fixed high salary for its employees. It had long been recognised that the purpose of the service charge was to supplement income. It was merely a practice and not a policy. Further the service charge points were not obtained as a consequence of the diligence or hard work of the employees but were based on rooms occupancies as well as and prices of rooms. Therefore, with the introduction of the minimum wage system the need for service charge to supplement the basic wages did not exist.

[26] The applicant had also contended that the IC had erroneously disregarded the evidence of COW1, who had testified that most of the employees of the hotel within the coverage of the first CA are from the Food & Beverage Department and from front office who would also enjoy overtime benefits. As the overtime would be calculated based on their salaries, the overtime payment paid would be higher. The same applied to the payment of EPF contribution which would be higher as the EPF would be paid based on basic salary which had been increased.

[27] The applicant emphasised that the award by the IC, in raising the basic salary to RM900, and at the same time by allowing the employee to maintain his service charge points amounted to double compensation and was in violation of the maxim 'equity leans against double portions'.

Points raised by the union

[28] The union objected to the proposal by the hotel to convert each service charge point at an average value of RM355 and to incorporate this into the basic salary of each employee to enable the hotel to meet with the minimum wages envisaged by MWO based on the following reasons:

(a) firstly, the union contended that the value of RM355 per point proposed by the hotel is lower than the average for the first seven months of the year 2012, which was about RM390 and for three months hit the value of RM480 (see p 140 of encl 3);

(b) secondly the union contended that the proposal by the hotel would deprive the employees of a very fundamental and essential term of their contract of service with the hotel. This was due to the fact that the service charge was a separate element of remuneration and recognised under s 2 of the Employment Act 1955 as payment made for work done in respect of an employee's contract of service (see *Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia v Hotel Equitorial (M) Sdn Bhd* [2008] 3 ILR 590);

(c) thirdly, the service charge point served as an incentive for the employees to work hard and give their best to the hotel and this in turn would yield and/or increase productivity. The employees of the hotel were attracted to the hotel industry because of this pull factor and if these employees were deprived of these benefits, they no longer desire to stay in the industry;

(d) fourthly, the service charge system was part of the hotel remuneration system from the time the hotel commenced its business in January 1995. Therefore, the employees should not be denied this vital component of wages, which they had been enjoying as part of their remuneration system. Further the service charge system had been incorporated in their contracts of employment;

(e) fifthly, the service charge did not come from the hotel's coffer but paid by the customers through their bills and were meant to be paid to the employees for services rendered to the customers. Therefore, these monies did not form part of the fund of the hotel to be utilised for the payment of the employee's basic salary. In fact these monies were held on trust by the hotel for the benefits of the employees; and

(f) lastly, any attempt by the hotel to abolish this long and accepted practice which form part of the contract of service would result in the wages of the employees being less than their current wages provided in the contracts of service.

[29] In addition to the above, the union also contended that the service charge system was introduced to replace the tipping. This system would enable employees who were not the front liners and those who did not have direct contact with the customers to enjoy their share of the tips. The abolishment of the service charge would result in the employees to resort to tipping.

[30] The hotel's reliance on s 3 of the Guidelines on the Implementation of the Minimum Wages Order 2012 which stated that with respect of the hotel sector where the service charge was implemented, the employer may convert all or part of the same to form part of the minimum wages was misconceived as the guidelines itself had expressly provided that such a term was subject to negotiations between the employer and the employees. In the case at hand the union had strongly objected to the proposal. Further the hotel was only relying on the guidelines with no legislative force. Therefore, non-binding.

Discussion of the issues

Issue 1 — Whether the hotel can implement a clean wage system and abolish the service charge system ('clean wage')?

Issue 2 — In the alternative, in the event the service charge system is maintained, whether the hotel can restructure the wages by utilising the service charge or a portion thereof to top up its employees' basic wage to meet the payment of minimum wage ('hotel utilising service charge funds')?

Issue 3 — Whether in the event the service charge system is maintained, service charge can be distributed to employees who are not within the scope of the union's representation ('distribution of service charge')?

[31] With regard to the hotel industry, an important issue had arisen as a result of the introduction of the NWCC and more specifically the MWO, is that, whether the clean wage system should be implemented or whether the service charge system should be retained.

[32] I propose to deal with these three issues in one go herein.

[33] Having heard the submissions of the respective parties herein pertaining to these issues, I found favour with the submissions of the union. The reasons for my decision under these issues would be discussed in turn herein below.

[34] Let me begin by examining the definition of 'wages' and 'minimum wages' provided under s 2 of the NWCC:

(a) the definition of 'wages' has the same meaning assigned to it under s 2 of the Employment Act 1955; and

(b) the definition of 'minimum wages' means the 'basic wages' to be or as determined under s 23.

[35] What amounts to 'basic wages' had been illustrated in the case of *Decor Wood Industries (Trengganu) Sdn Bhd v Timber Employees' Union* [1990] 1 ILR 423 as:

> ... does not include additional emoluments which some workmen may earn on the basis of a system of bonus related to production. Nor does it include any other supplements and allowances, such as housing and cost of living which is not directly related to the work in that category.

[36] From the above, it would appear that the concept of 'basic wages' under the NWCC does not include any other additional components. This concept had been illustrated in OP Malhotra's *The law of Industrial Disputes* at p 84 as follows:

> The phrase 'basic wage' is also ordinarily understood to mean that part of the price of labour, which the employer must pay to all workmen, belonging to all categories. The phrase is used ordinarily, in contradistinction to allowance — the quantum of

which may vary in different contingencies. The 'basic wage', therefore does not include additional emoluments, which some workmen may earn on the basis of a system of bonuses, related to production. The quantum of the earnings from such bonuses, varies from individual, to individual according to efficiency and diligence; it will vary sometimes from season to season, with the variation in the working conditions in the establishment; it will also vary with variations in the rate of supply of raw materials or with assistance obtainable from machine. This element of variation excludes the additional emoluments from connotation of the 'basis wage'.

[37] For the purpose of implementing the MWO, the employer may, before the coming into force of the MWO, negotiate on the restructuring of wages (see O 6 of the MWO) provided that:

(a) the restructured basic wages to be paid to the employee should be in accordance with the minimum wages rates specified in the MWO (O 6(a));

(b) the restructured wages should not be less favourable than the employee's existing wages (O 6(b));

(c) the restructured wages should not be less than the amount of wages earned by the employee as agreed in the contract of service before the restructuring of wages (O 6(c));

(d) the restructuring of wages should only involve the payment for work done during the normal hours of work of the employee (O 6(e)); and

(e) the restructuring of wages should not cause the employee to lose any remuneration specified under paras (a)–(f) of the definition of 'wages' in s 2 of the Employment Act 1955, s 2of the Sabah Labour Ordinance and s 2 of the Sarawak Labour Ordinance which the employee would be entitled to under the contract of service (O 6(f)).

[38] The law had envisaged that the implementation of the minimum wage system must not in any way result in the employee getting anything less favourable than the employee's current wages. Neither could the basic restructured wages be less than the amount of wages earned by the employee pursuant to the contract of service.

[39] The concept of service charge had been discussed in the case of *National Union of Hotel, Bar and Restaurant Workers, Peninsular Malaysia v Masyhur Mutiara Sdn Bhd* [2014] 1 MELR 286. The rationale for the introduction of the service charge in the hotel industry was to replace the practice of tipping which only benefitted the guest service employees of the hotels but not others who were not in direct contact with the customers or patrons of the hotel. In order to provide a more equitable scheme to be enjoyed by the eligible employees, guest service or non-guest service alike, a collection system which

could be shared by all eligible employees of the hotel was introduced by the leading hotel, known as Merlin Hotel and this had set the standard for other hotels to adopt. This service charge system had become the norm in the hotel industry and become an important component of wages paid to hotel employees.

[40] The service charge, normally at 10% would be levied on the customer's bills which must be paid by these customers and subsequently channeled into a fund called service charge fund. 10% of the fund would be taken by the hotel and 90% would be distributed to eligible employees' subject to the service points allocation agreed by both parties. Under this scheme, the hotel is bound under the contract of employment to make payments based on their service charge points.

[41] The service charge scheme is unique, in that, the money does not come from the employer but collected from the customers of the hotel and placed in a fund jointly owned by the employer and employees. This fund is pure income of the employee which sum is paid to employees pursuant to the contract of service.

[42] The Privy Council had clarified that the money from which the service charge points were paid did not belong to the hotel (see *Peter Anthony Pereira and Another v Hotel Jayapuri Bhd and Another* [1986] 1 WLR 449).

[43] The rationale and concept for the introduction of the service charge in the hotel industry as highlighted above showed that the money collected and deposited into the joint account of the employee and the hotel belongs to the eligible employees of the hotel and the payment to the employees in accordance of the service points allocation is provided in the contract of employment, hence I agree with the award made by the IC that the hotel could not be permitted to meet its obligation to pay the minimum wage as envisaged by the NWCC and MWO by utilising the service charge paid by its customers or patrons. In view of the above, the 'clean wage' system proposed by the hotel was rightly rejected by the IC.

[44] In arriving at this decision, the IC had revisited the letter for offer of employment with respect to one Ahmad Faisal Ismail, a witness of the union dated 29 October 2008, which was exhibited as UB at p 2 who was employed as a housekeeping attendant assigned to the hotel and the IC found that one of the essential terms and conditions stated in the offer letter stated as follows:

> Further to your employment and subsequent interview, we are pleased to offer you employment with Crystal Crown Hotels & Resorts Sdn Bhd On the following terms and conditions:

A 4. Salary

Your salary will be RM300.00 with 2.5 service charge points per month and subjected for revise periodically.

B **[45]** The IC held that as the above terms and conditions had been provided in the contract of service, therefore these terms could not be unilaterally altered and the hotel was bound by these fundamental terms and conditions and must honour its part of the obligations.

C **[46]** In the alternative, should the IC reject the proposal of the hotel for to utilise the service charge for purposes of making up to reach the 'minimum wage' as stipulated in the MWO, the hotel had also implored on the possibility for the said service charge, or a portion of it to be utilised to supplement the basic wage to meet RM900 statutory rate, but the IC had refused to adhere to
D the hotel's request. In doing so, the IC was guided by the case of *National Union of Hotel, Bar & Restaurant Workers v HM Shah Enterprise Sdn Bhd* [1981] 1 ILR 192 which ruled that the proportion of 9:1 is currently the standard in the hotel industry.

E **[47]** The IC had also considered the proportion adopted in *Bukit Jambul Hotel Development Sdn Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar Dan Restoran, Semenanjung Malaysia* [2005] 2 ILR 927 at p 943 ('*Bukit Jambul*') which was the same as the one adopted by the hotel industry. The IC
F went further to state that this proportion must be maintained unless for good reasons, as this has become the norm in the hotel industry. Since it had been ruled earlier by the Court of Appeal in *Hotel Equitorial (M) Sdn Bhd v Thomas George MJ George* (Civil Appeal No R2-16-6 of 1995) that service charge is part of wages, therefore it did not behove that the IC decide that a portion of
G that wages should be given to the employer for the same to be utilised to pay the employees.

[48] In view of the above reasoning and the points raised by the Union as highlighted in the preceding paragraphs, is it fair for the hotel to suggest that
H each service charge point at the average of RM355 be converted and incorporated into the basic salary of each employee in order to meet the minimum wages mandated by NWCC and MWO? I would answer the above proposition in the negative.

I **[49]** Based on the foregoing, I am of the view that the IC was justified in rejecting the hotel's proposal for the service charge to be utilised to make up for the minimum wage provided under the law. The same applied to the proposal of the hotel for a portion of the service charge to be utilised to supplement the basic wage to meet the RM900.

[50] With reference to the hotel's proposal for employees outside the scope of the union's representation and not covered by the CA to be allowed to share the service charge, the IC was guided by the case of *Hotel Continental (Penang) Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers* [1984] ILR 34 which held that the CA could not apply to employees who are not covered by the CA and employees who are precluded by s 9(1) of the Industrial Relations Act 1967, ie those who fall under the managerial, confidential and securities capacities. The issue whether a collective agreement/award could apply to employees not covered by the collective agreement had been discussed in a number of cases and the answer is in the negative (see *Hotel Perdana Sdn Bhd, Kota Bharu, Kelantan v National Union of Hotel, Bar & Restaurant Workers* [1984] ILR 748 752; *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* Award No 88 of 82; *Hotel Continental (Penang) Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers* Award No 217 of 82).

[51] The IC had correctly rejected the hotel's proposal. If the IC were to accede to the same this would offend s 9(1) of the IRA as the security officers and secretaries were excluded under the said section.

Issue 4 — Whether, in view of the unions concession on retrospective adjustment of salaries, the award can be severed ('retrospective adjustments')?

[52] The union had agreed to drop its claim for 10% immediate increment on the salary revision as stated in cll (a)–(b) read with Appendix A and (d) at the IC. However, the IC had overlooked this issue and went ahead to make an award in favour of the union under these items.

[53] The union took the same position before me, however the hotel contended that this court has no authority to sever that part of the award from the rest of the award. The hotel contended that if this court were to accede to the union's request, this would render the whole award invalid.

[54] I am guided by the cases cited by learned counsel for the respondent which had clearly stated that the court is vested with the authority to sever part of the award from the rest of the award leaving the rest of the award valid and binding. In *V Subramaniam & Ors v Craigielea Estate* [1982] 1 MLJ 317, the Federal Court had ruled that if there was a mistake, the award was severable and the High Court could quash that part which was a mistake without touching the rest.

[55] The same principle was decided in the case of *Palmco Holdings Bhd v Commissioner of Labour & Anor* [1986] 1 MLJ 492 where the Supreme Court held that the doctrine of severability could be applied if that part of the award

was not 'inextricably interconnected'. Components (b)–(c) of the award could be easily removed from the award and it is not 'inextricably interconnected' with other components.

[56] Hence this issue must be decided in favour of the union.

Issue 5 — Whether the award which accepted the union's proposal on salary structure and the 20 step increment is reasonable ('salary structure')?

[57] The dispute under this head was whether the 18 step salary scale proposed by the hotel should be adopted or the 20 step salary scale proposed by the union was to be accepted. The IC had accepted the 20 step salary scale proposed by the union. The basis for this were:

(a) the hotel has been in operation for almost 20 years;

(b) the union was guided by the 20 step salary scale adopted by a neighbouring hotel, Shah Village; and

(c) despite the first CA being the first CA to be executed, the hotel had been in business for almost 20 years.

[58] Based on the reasons given, I am of the view that the 20 step salary scale was justified and ought to have been accepted.

Issue 6 — Whether the award which ordered that the effective date of the first collective agreement can be backdated to 1 October 2011 is reasonable ('effective date of award')?

[59] The award touching the effective date of the first CA was well within the provision of s 30(7) of the IRA. Therefore, this part of the award ought not to be disturbed.

WHETHER DECISION MAKING PROCESS SUFFER FROM INFIRMITIES

[60] My task at this juncture is to undertake a critical examination of the facts and the law placed before the IC and now before me and decide if the decision of the IC suffers from infirmities of illegality and/or irrationality as alleged by the applicant to merit curial intervention.

[61] I observe that in resolving the dispute before it, the IC had discussed the correct principles of law enunciated in the cases which had been highlighted before me.

[62] Upon my perusal of the award of the IC, I am satisfied that the IC had asked itself the correct questions in making its findings as reflected in the award. The IC had considered relevant matter and had not considered irrelevant matter.

[63] At the end of it, all the question which this court would have to ask itself is whether a reasonable tribunal similarly circumstanced would have come to the same decision on the facts before it (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235).

[64] I am also mindful that it is the function of the IC, not this court, to weigh and assess the evidence of the witnesses (see *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 2 CLJ 501).

[65] On the totality of the evidence before me, I am satisfied that the IC had acted within its jurisdiction and duties.

[66] I could not detect any errors having been committed by the learned IC Chairman either on the appreciation of facts and/or law. Based on the totality of the evidence presented before the IC, there was sufficient evidence to assist the IC in handing down the award. As such, the decision of the IC could neither be termed as irrational nor unreasonable for the same to be quashed by this court.

CONCLUSION

[67] Based on the aforesaid and upon a careful consideration of the facts placed before the IC, I am satisfied on the issues that were presented before it as discussed above, the decision of the IC did not suffer from infirmities of illegality and irrationality to merit curial intervention. For the above mentioned reasons, I refused the prayers sought in terms of encl 5 with costs. After hearing a brief submission on the issue of costs, I have allowed costs of RM7,000 to be awarded to the respondent.

Prayers sought in terms of encl 5 dismissed with costs of RM7,000.

Reported by Dzulqarnain Ab Fatar